In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in suggesting to the jury that they should "totally disregard the testimony of [any] witness" whom they believed to have lied.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a). He was sentenced initially to life imprisonment; subsequently the sentence was reduced to 35 years' imprisonment. The court of appeals affirmed (Pet. App. A).

On the evening of January 25, 1973, Davis Capps and his fiance were parked in the fiance's automobile on a road in Bell County, Kentucky, when four men approached the vehicle (Tr. 54–56, 92). One of the men, identified by Capps as petitioner, pushed a shotgun through the open window of the car. Capps grabbed the barrel and the weapon discharged, injuring no-one (Tr. 55–56, 58, 94).[1]

Capps then got out of the automobile and was assaulted by two of the men; at the same time his fiance was forcibly removed from the car (Tr. 56, 94). The men overpowered Capps, put tape over his eyes, robbed him, and put him in the trunk of the automobile. They also taped the woman's eyes and put her in the front seat of the car. The assailants then drove the couple to nearby Claiborne County, Tennessee, where the woman was raped by three of the attackers and sexually molested by the fourth (Tr. 60–62, 95, 97–104). The men then fled.

At trial Capps positively identified petitioner, whom he had known previously, as one of the assailants (Tr. 58–59).[2] The government also showed that petitioner's fingerprint appeared on a drinking glass found at the scene of the assault on Capps' fiance (Tr. 147–149, 177, 187). Petitioner's defense, which he attempted to establish through the testimony of several

[1] Capps had known petitioner for some time prior to the kidnapping and recognized him by "general features" and voice (Tr. 77–78, 85).

[2] Capps was never able to identify the other assailants; his fiance testified that she did not recognize any of them (Tr. 123).

witnesses, was that he was elsewhere at the time of the crime and had a bad cold that night which so affected his voice that Capps' identification of him, which was based on the voice as well as the general physical characteristics of the assailant, must have been mistaken (Tr. 226–238, 277–278, 301–302, 309–310, 313–314, 319, 321, 330, 332, 336, 351–352, 359, 369–366, 381–389, 407–410).

Petitioner claims error in the district court's charge to the jury that (Tr. 534–535) "[I]f you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness." Petitioner did not object to the charge at trial (Tr. 537), however, and therefore must be deemed to have waived it. Rule 30, Fed. R. Crim. P. If he had objected, the court could have given a supplementary or clarifying instruction. Nor did petitioner challenge the instruction on appeal. The issue is therefore not properly presented here and there are no special circumstances that should lead this Court to depart from its usual practice of not considering issues not raised in the courts below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

In any event, when read in context, the portion of the charge challenged by petitioner did not improperly invade the province of the jury. The court charged as follows (Tr. 530–535):

> One last instruction I want to give you, and I give it to you because you are confronted

with evidence, which if believable on both sides, leaves you somewhere in the middle, and I want to talk to you for a moment about the credibility of witnesses. In considering the trial of any case, you should consider the testimony of each individual witness against the background created by all other evidence in the case, because that's the landscape and the test that you have available to you. * * *

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Consider whether or not any discrepancies you find in this evidence to be material to main points to the essential elements, or whether they apply to some minor inconsequential fact.

* * * * *

Now, in saying all of this, I am not saying that witnesses lied, although some do, but what I am saying to you is simply to describe what I believe to be a very normal occurrence in fallible, frail human beings. It is very easy for all of us to have an innocent misrecollection of what occurred at some time in the past, or to have a partial recollection, and the fact that a person does not recall or does recall minutia, or very small details, in and of itself is not a critical factor if you believe that he is the type of person that normally would recall those. In any event, the best test is to find that evidence which you are naturally persuaded by, that for you has a high credibility factor, that you believe it and you put trust in it, and when you find that standard, compare all of the other evidence in the case against it.

> Ladies and Gentlemen, it may be that eventually you will have to get to the point where you decide that a witness was not making some innocent error in testimony, but was making an intentional falsehood in their testimony. If you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness.
>
> After you have made your own individual judgment as to all of the evidence and the evidence of each individual witness, you will give to it such credibility and belief as you think is proper and from that evidence which you find to be believable and credible you will make your decision as to the two essential elements in the crime of kidnapping.

* * * * *

We submit that these instructions, taken as a whole, did not deny petitioner a fair trial. The court told the jury that they should consider whether discrepancies in a witness' testimony were material or simply inconsequential, and repeatedly stressed that they should decide for themselves what credibility to give to the testimony of each individual witness. The instruction did not point to any witness or group of witnesses, but left it wholly to the jury to decide whether knowing falsification had occurred and, if so, by whom. Moreover, at the outset of the instructions the court instructed the jury that they were the sole judges of the facts (Tr. 508). Finally, the testimony of most of the defense witnesses related solely to petitioner's whereabouts on the night of the kidnapping, and in these circumstances a knowing falsifica-

tion in one material respect would necessarily make the witness' entire testimony suspect.

Thus, in the context of this case, the district court's suggestion that the jury disregard the testimony of a witness it believed to have intentionally lied amounted to no more than a recommendation that the jury should hesitate to credit such unreliable evidence. The instruction as a whole adequately impressed upon the jurors their exclusive authority to judge the credibility of the witnesses, and was not an impermissible attempt by the trial judge to influence the outcome of the trial. See *United States* v. *Howard,* 433 F.2d 505, 512 (C.A.D.C.).[3]

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[3] *United States* v. *Cisneros*, 491 F.2d 1068 (C.A. 5), and *United States* v. *Ornstein*, 355 F.2d 222 (C.A. 6), relied upon by petitioner, are inapposite. In *Cisneros* the district judge in commenting on the evidence "became for a short moment a witness in [the] trial, testifying about something he had seen"; indeed, "he came very close to behaving for an instant as an actual witness for the prosecution" (491 F.2d at 1075). In *Ornstein* the court in the presence of the jury opined "that the Government had proved what were several essential elements of the crime" charged (355 F.2d at 225). In the case at bar the district court neither acted as a witness nor led the jury to believe that the government had successfully discharged its burden of proof in any way.

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